SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 898

FRED LOCHMANN,

vs. *Petitioner,*

ED SYKES FOR AND IN BEHALF OF HIMSELF AND CERTAIN OTHERS SIMILARLY SITUATED AND AS AGENT FOR THOSE OTHERS, TO-WIT: MACK PHILLIPS, JOHN W. PHILLIPS, LEWIS GRIFFIN, LEROY GRIFFIN, WESLEY V. LEWIS, AND ALBERT HEADLEY.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF KANSAS.

BRIEF IN SUPPORT OF PETITION.

I.

Opinion of the Court Below.

The case was instituted by the respondents in The District Court of Sedgwick County, Kansas, was taken on appeal to the Supreme Court of Kansas by the petitioner and the

decision of the Supreme Court of Kansas is officially reported in 156 Kansas 223, 132 Pac. (2nd) 620.

II.

Statement of Case.

The statement of the case containing all that is material to the consideration of the questions presented has been made in the petition for the writ and such statement is hereby adopted and made a part of this brief.

III.

Assignment of Errors.

ONE.

The Supreme Court of Kansas erred in holding under the facts shown by the record before it that the petitioner, by reason of his operation of a packing plant, in the manner in which he operated the same, was subject to the provisions of the Fair Labor Standard's Act of Congress. U. S. C. A. Title 29, Sec. 201, et seq., and therefore erred in sustaining the judgment of the Trial Court.

TWO.

The Supreme Court of Kansas erred in holding that the employees of the petitioner were subject to the provisions of the Fair Labor Standards Act during all of the time they were in the employment of the petitioner regardless of the character of the work which they were performing when the Trial Court found and the record is undisputed that only a small portion of their time was consumed in work which could possibly have constituted the preparation of goods for interstate commerce.

THREE.

The Supreme Court of Kansas erred in denying to the petitioner an exemption from the Act for a period of fourteen weeks in each calendar year for each employee under the provisions of 29 U. S. C. A. Sec. 207 (c).

FOUR.

The Supreme Court of Kansas erred in allowing to the respondents an attorney fee of Three Thousand Dollars.

IV.

PROPOSITION ONE.

Are the employees of the petitioner engaged in work which constitutes the production of goods for interstate commerce within the provisions of the Fair Labor Standards Act?

The findings of fact made by the Trial Court and approved by the Supreme Court of Kansas are set out in full in the opinion of the Supreme Court (R. 237). The only acts which the employees of the petitioner perform which the Court considers constituting the production of goods for interstate commerce is the skinning of the hides off the cattle, the separation of the bones from the meat, removal of the hooves and offal and the depositing of the same on the shipping dock of the petitioner. The manner in which the hides, bones, hooves and offals enter the channels of interstate commerce, as held by the Supreme Court, is by being sold by the petitioner, at his dock, to the Reed Hide Company and Wichita Desiccating Company, both in Wichita. The Reed Hide Company bales and salts the hides and ships them to points outside of Kansas. The Wichita Desiccating Company manufactures the bones, hooves and offal into a product which it ships to points outside of Kan-

sas. The petitioner makes no shipments or sales of his own goods outside of the State of Kansas and the products which he sells are not under federal inspection The business of the petitioner as it appears from the record is the manufacturing and curing of sausage, luncheon meats, etc. The petitioner's relation to the Reed Hide Company and the Wichita Desiccating Company is only that of vendor and vendee. When the Reed Hide Company gets the hides at the petitioner's dock they are not a fit subject for interstate commerce, they must be put through a process by the Hide Company, they would spoil in an hour, and before they could reach the State line and no transportation Company would accept them (R. 33-34). The hooves, bones and offal are also handled in the same way by the Desiccating Company and are also unfit to become a subject of transportation. The process of manufacture of these articles is much longer and more complicated than the processing of the hides, they are ultimately made into a product called tankage (hog feed), packed in hundred pound bags, branded with a trade mark and shipped by the Desiccating Company to other states (R. 61-64). All of the articles in question here end their journey in so far as the petitioner is concerned on his own dock, others transport them in their own vehicles to their own plants where they come to rest again in Wichita (R. 33 et seq. R. 48 et seq.). They remain in this new location for a long time and are processed and changed in form before they begin their interstate journey. The work of the employees in so far as it relates to the preparation of goods for interstate commerce is distant and remote, its effect on interstate commerce at most could be only a distant repercussion. To hold that the Act reaches the work of the employees here, is to indulge in a theoretical application of the Act and to disregard any practical application of the same. To say that the skinning of the hide off of a cow by an employee in the plant of the peti-

tioner is an industrial ritual essential to the ultimate manufacture of the hide into shoes in St. Louis, is as theoretical "far fetched", impractical, and illogical as it would be to say that the farm boy who fed the cow a measure of corn each morning in the cow lot on the Kansas farm is engaged in the preparation of goods for interstate commerce within the meaning of the Act, simply because he was growing a hide on the cow and there are no tanneries in Kansas (R. 33) and he could have no shoes unless the hide is ultimately shipped to St. Louis and made into shoes and he cannot be ignorant of the fact that the cow's hide which he is growing must ultimately arrive by means of interstate commerce at St. Louis. There is no practical difference in the ultimate effect of the work of the boy who puts the hide on the cow with a measure of corn from the boy who skins the hide off the cow with a butcher knife. Congress surely did not contemplate such an application of the Act as has been made here by the Supreme Court of Kansas. We believe that such an application of the Act is not only illogical but is unfair to Congress.

The sole power of Congress to regulate the work of the employees of the petitioner must be found in:

> U. S. Const., Art. I, Sec. 8, Clause 3. "Congress shall have power. * * * To regulate Commerce with foreign nations, and among the several States, and with the Indian Tribes."

All other powers are vested in the people of Kansas.

> U. S. Const. Art. X. "The powers not delegated to the United States by the constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

Congress, therefore, in enacting the Fair Labor Standards Act, cannot go above and beyond its vested power, which is the Constitution.

> "The constitution found it (commerce) an existing right, and gave to Congress the power to regulate it." Gibbons *v.* Ogden (9 Wheat. 1), 22 U. S. 1-211.

The power to regulate commerce is therefore the power, "to prescribe the rule by which commerce is governed." Therefore we must conclude that if the acts of petitioner can be regulated, we must find that the work of the employees so directly effect commerce that the work itself constitutes intercourse between state and state, which, thereupon, would confer upon Congress the power, "to prescribe the rule by which commerce is governed." The Fair Labor Standards Act defines commerce as:

> "Commerce means trade, commerce, transportation, or communication among the several states or from any state to any place outside thereof." (U. S. C. A. Sec. 203.)

If the purely local act of skinning the hides from the cattle, cutting out the bones and hooves, bear such a close and governing force on, "* * * trade, commerce, transportation, transmission or communication among the several states * * *", then state sovereignty is in no wise free from destruction by the national sovereignty.

United States v. *F. W. Darby Lumber Company,* 312 U. S. 100, 85 Law Ed. 395. Chief Justice Stone says:

> "To answer this question we must at the outset determine whether the particular acts charged in the counts which are laid under Sec. 15 (a) (2) as they were construed below, constitute 'production for commerce' within the meaning of the statute. As the government seeks to apply the statute in the indictment, and as the court below construed the phrase 'produced for interstate commerce'. It embraces at least the case where an employer engaged, as are appellees, in the manufacture and shipment of goods in filling orders

of extra-state customers, manufactures his product with the intent or expectation that according to the normal course of his business all or some part of it will be elected for shipment to those customers".

Santa Cruz Fruit Packing Company v. *National Labor Relations Board,* 303 U. S. 453, 82 Law Ed. 954. Chief Justice Hughes says:

"It is also clear that where federal control is sought to be exercised over activities which separately considered are intrastate, it must appear that there is a close and substantial relation to interstate commerce in order to justify the federal intervention for its protection. However difficult in application, this principle is essential to the maintenance of our constitutional system. The subject of federal power is still 'Commerce', and not all commerce but commerce with foreign nations and among the several States. The expansion of enterprise has vastly increased the interests of interstate commerce but the constitutional differentiation still obtains. *Schechter Corporation* v. *United States,* 295 U. S. 495, 546. 'Activities local in their immediacy do not become interstate and national because of distant repercussions.'" Id., p. 554.

* * * * * * *

"To express this essential distinction, 'direct' has been contrasted with 'indirect' and what is 'remote' or 'distant' with what is 'close and substantial.' Whatever terminology is used, the criterion is necessarily one of degree and must be so defined. This does not satisfy those who seek for mathematical or rigid formulas. But such formulas are not provided by the great concepts of the Constitution such as 'interstate commerce,' 'due process,' 'equal protection.' In maintaining the balance of the constitutional grants and limitations, it is inevitable that we should define their applications in the gradual process of inclusion and exclusion."

Consolidated Edison Co. v. *National Labor Relations Board,* 95 F. (2d) 390, Second Circuit Court of Appeals, March 14, 1938.

> "Undoubtedly the scope of this power (the power of Congress to regulate commerce) must be considered in the light of our dual system of government, and may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government."

National Labor Relations Board v. *Jones,* etc., 301 U. S. 1, 81 Law Ed. 893, Opinion by Chief Justice Hughes:

> "The scope and power of Congress over interstate commerce may not be so extended as to embrace effects upon interstate commerce so indirect and remote that to embrace them would effectually obliterate the distinction between what is national and what is local and create a completely centralized government."
>
> "The authority of the federal government may not be pushed to such an extreme as to destroy the distinction, which the commerce clause itself establishes, between commerce 'among the several states' and the internal concerns of a State. That distinction between what is national and what is local in the activities of commerce is vital to the maintenance of our federal system."

In *Chassaniol* v. *City of Greenwood,* 291 U. S. 584, 586, Mr. Justice Brandeis, speaking for the court, said:

> "Chassaniol contends that all the cotton is in interstate or foreign commerce from the moment it leaves the gin for Greenwood, or at least from the moment it is purchased at Greenwood by the buyer. The argument is that already at that time the cotton is destined for ultimate shipment to some other state or country;

and that to tax the occupation of the cotton buyer burdens interstate commerce, since the buyer at Greenwood is the instrumentality by which the interstate transaction is initiated. The business involved is substantially like that described in *Federal Compress Co.* v. *McLean;* and the rule there declared must govern here. Ginning cotton, transporting it to Greenwood, and warehousing, buying and compressing it there, are each, like the growing of it steps in preparation for the sale and shipment in interstate or Foreign commerce. But each step prior to the sale and shipment is a transaction local to Mississippi, a transaction in intrastate commerce."

United States v. *Schechter,* 79 Law Ed. 1570, 55 Sup. Ct. 837, 295 U. S. 495. Opinion of Chief Justice Hughes:

"The slaughtering by wholesale poultry dealers of poultry shipped into the state and purchased by them from the consignees and the resale of the slaughtered poultry to retail dealers are neither transactions in, nor acts relating to interstate commerce, so as to bring the regulations of the wages and hours of employees of such wholesale dealers within the scope of the power conferred upon Congress by the Commerce Clause of the Federal Constitution." "Where the effect of intrastate transactions upon interstate commerce is merely indirect, they do not fall within the power conferred upon Congress by the Commerce Clause of the Federal Constitution."

Kirschbaum v. *Walling,* 316 U. S. 517, 86 Law Ed. 1638. Opinion by Mr. Justice Frankfurter.

"The body of Congressional enactments regulating commerce reveals a process of legislation which is strikingly empiric. The degree of accommodation made by Congress from time to time in the relations between federal and state governments has varied with the subject matter of legislation, the history behind the particular field of regulation, the specific terms in which

> the new regulatory legislation has been cast, and the procedures established for its determination. * * * Thus, while a phase of industrial enterprise may not come within the 'commerce' protected by the Sherman Law. * * * Similarly, enterprises subject to federal industrial regulation may nevertheless be taxed by the States without putting an unconstitutional burden on interstate commerce" "We cannot, therefore, indulge in the loose assumption that when Congress adopts a new scheme for federal industrial regulation, it thereby deals with all situations falling within the general mischief which give rise to legislation."

It will therefore appear from the *Kirschbaum* case, supra, that the decision in each case must depend on its own peculiar facts. The Court, in the *Kirschbaum* case, found that the service of the building maintenance workers bore "a close and immediate tie" to interstate commerce as did the oil well drillers in the case of *Warren-Bradshaw Drilling Company* v. *Hall,* 63 Sup. Ct. 125, 87 Law. Ed. 99. There might be a reasonable expectation that the drillers of oil wells producing oil and connected with interstate pipe lines would have a close relation to interstate commerce. This surely could not have been the case, however, if the wells drilled, referred to in the *Warren-Bradshaw* case, had been "dry holes". There could be no reasonable expectation or anticipation that the hides and offals produced here could move in interstate commerce, for as they were produced they were fit only for local commerce. They would have become so offensive and putrid within an hour's time that no transportation company would have accepted them for interstate commerce. The hides, hooves and offals were not "worked on" or "produced" for "trade, commerce, transportation, transmission, or communication among the several states". We say, as was said in *Swift and Company* v. *United States,* 196 U. S. 375, 398, that "commerce among the States is not a technical legal conception, but a

practical one, drawn from the course of business," as it was also said in *Overstreet* v. *North Shore Corporation*, 87 Law Ed. 423, 63 Sup. Ct. Rep. 494, "And in determining what constitutes 'commerce' or 'engaged in commerce' we are guided by practical considerations". The drawbridge maintenance workers maintaining a drawbridge on an interstate highway over an interstate navigable river clearly were, "so closely related to that interstate movement as a practical matter that * * * they must be regarded * * * 'as engaged in interstate commerce' ".

We assert that the work of the respondents in skinning off the cattle hides and separating the offals and hooves from the carcasses, bears such a remote, theoretical, and impractical relation to the production of goods for commerce that the provisions of the Fair Labor Standards Act cannot apply to them.

PROPOSITION TWO.

Are the employees of the petitioner subject to the provisions of the Fair Labor Standards Act during the whole of the time they are in the employment of the petitioner when only a very small portion of their time is consumed in work on goods which have only a remote relation to interstate commerce?

The business of the petitioner is the manufacturing and curing of sausage and luncheon meats. As an incident to this work, he must remove the hides, hooves, and offals from the slaughtered animals. He operates a small packing plant and cannot separate the work of his employees into departments and consequently all of the respondents, in the work of manufacturing and curing sausage and luncheon meats, separate the bones, hooves, and offal from the meat and possibly as many as two of them do the skinning. It is conceded that the hides, hooves and offals are the only

articles that could have even a remote relation to interstate commerce. The relation which these products bear to the other business of the petitioner, both in amount of time consumed in preparing them by the respondents, and in money value, is infinitesimal. The Trial Court and the Supreme Court of Kansas, nevertheless, held that the whole work week of the respondents which the jury found to be sixty-three and one-half hours was subject to the Act and figured the wage scale and time and one-half for overtime on that basis. The Supreme Court of Kansas found the proceeds from the annual sale of the hides amounted to $12,000.00, which, the Court assumed, was but a small percentage of the production of the petitioner's plant (R. 251). The undisputed evidence was that the relation of the hides to the total business was 2.9 per cent (R. 123). During a four-month comparative period, the hides brought $3,710.35 and the bones and offal from $20.00 to $30.00 per week (R. 123-124). In 1940, the petitioner killed 15,521 hogs and 2,242 cattle (R. 124), which is a fair comparative period for his business. We continually importuned the Trial Court to ascertain how much time the respondents actually worked on the articles which they claimed were a part of interstate commerce (R. 151 et seq.). We requested that special question No. 4 be submitted to the jury which would have determined this point (R. 147). We called this to the attention of the Supreme Court in specifications of error and on motion for rehearing. The undisputed evidence was that the only respondent who did cattle skinning was Wesley Lewis and he, with one William Lee, performed this work (R. 98). All of the respondents cut out bones and hooves at various times which accumulated from one to two barrels of bones per day (R. 100).

History of Fair Labor Standards Act. 118 F. (2d) 206, 83 C. R. 9168. (Senate—75th Congress, 3rd

Sess. June 14, 1938) Senator Pepper, member of Conference Committee, said:

"It is applicable only to those employees who, themselves, are engaged in interstate commerce, or the production of goods for interstate commerce."

Walling v. *Jacksonville Paper Company*, 87 L. Ed. 393, No. 336, October Term, 1942. Decided Jan. 18, 1943. Opinion by Mr. Justice Douglas:

"In this connection we cannot be unmindful that Congress in enacting this statute plainly indicated its purpose to leave local business to the protection of the states." S. Rep. No. 884, 75th Cong., 1st Session, Pt. 8 p. 9169.

Certainly the burden must be on the respondents who seek judgment against the petitioner to establish the amount of time they consumed in working on those goods which they alleged moved in interstate commerce, certainly they must have the burden of establishing by some fair and accepted method the amount to which they claim to be entitled. Neither the Trial Court nor the Supreme Court would place this burden on the respondents and in this they committed error.

Warren-Bradshaw Drilling Company v. *Hall*, 63 Sup. Ct. 125, 87 L. Ed. 99.

"The application of the Act depends upon the character of the employees' activities. Kirschbaum *vs.* Walling, supra, P. 524. The burden was therefore upon respondents to prove that in the course of performing their services for petitioner and without regard to the nature of its business, they were, as its employees, engaged in the production of goods, within the meaning of the Act, and that such production was for interstate commerce."

It is evident that the time which the respondents expended in the skinning of the cattle, cutting out the bones

and offals, was so inconsequential in comparison with the time they expended on products that are conceded not to have affected iinterstate commerce that it is clear that the respondents cannot avail themselves of the provisions of the Act. The work which the respondents do on articles for interstate commerce must be a substantial part of their activities.

Walling vs. *Jacksonville Paper Company,* 87 Law Ed. 393. No. 336 October Term, 1942. Decided January 18th, 1943.

"The applicability of the Act is dependent on the character of the employees' work. * * * If a substantial part of an employee's activities related to goods whose movement in the channels of interstate commerce was established by the test we have described, he is covered by the Act."

In trying to determine what is "substantial" the Supreme Court of Kansas permits itself incorrectly to be governed by the amount of production the petitioner produced which bore a relation to interstate commerce, than by ascertaining what is "substantial" by determining the employee's activities related to goods whose movements are in interstate commerce. We see, therefore, that it is the quantum of the employee's activities which are of sole importance. The final effect of the decision is to condemn the petitioner for sixty-three and one-half hours per week when on the other hand it recognizes that the respondents could have worked but an infinitesimal portion of their time on goods for interstate commerce.

Snavely, et al, vs. *Shugart,* U. S. Dist. Ct. Southern Dist. Texas, 6 Labor Cases 61,165. Kennerly, Dist. Judge.

"Where an employee is engaged in both intrastate and foreign commerce, the burden of showing how

much time he was employed in interstate commerce is on the employee in a suit under the Act to recover minimum wages and overtime compensation."

Brown v. Tracy Bottling Co., U. S. Dist. Court, Dist. Minnesota Civil No. 88. June 8, 1942, 6 Labor Cases 61,109.

"A seller and distributor of beer and soft drinks whose sales are entirely within the state of the location of his business establishment and whose employees spend less than one per cent of the total manhours spent by employees of defendant in interstate commerce in the conduct of defendants business, is not engaged in interstate commerce, and an employee suing to recover minimum wages and overtime compensation as provided in the Fair Labor Standards Act cannot recover where he fails to prove that he was engaged in commerce or the production of goods for commerce during any specific work week during his employment. The loading and unloading activities of the plaintiff performed on goods originating from or destined to points outside of the state of Minnesota constituting activities which might be engaged in interstate commerce or in the production of goods for interstate commerce were so inconsequential as to come within the maximum 'de minimis' rule and therefore do not bring the plaintiff within the purview of the Act."

Rouhoff, et al v. *Gromling & Company*, 5 Labor Cases 60,822. Not yet reported in official advance sheets. U. S. Dist. Court of Arkansas. Nimble, District Judge.

"It appeared in this case that the only articles regarded as moving in interstate commerce were certain drop shipments and the Court said, 'In the case at bar, the uncontradicted evidence establishes that the total of the drop shipments is not more than one-half of one per cent of volume of business in dollars and cents, and in tonnage is so infinitesimal a part that it was impossible to estimate it. This case comes squarely

within the doctrine of "de minimis non curat lex," and even conceding that the drop shipments constitute interstate commerce, they are too insignificant for the Court to notice.' "

Wiley Jones vs. *Springfield Missouri Packing Co.* 6 Labor Cases 61,213. U. S. Dist. Ct., Western Dist. Missouri. Reeves, District Judge.

"Another principle applicable and controlling here is that, assuming (though not finding) some of the products of the defendant found their way into interstate commerce, there was no evidence as to what part of the work of the plaintiff's was in interstate commerce and what part in intrastate commerce."

The respondents cannot successfully assert that there is in this case, a hopeless commingling of goods under the authority of *U. S.* vs. *Darby*, 312 U. S. 100, 85 Law Ed. 609, wherein Mr. Justice Stone says:

"A familiar like exercise of power is the regulation of intrastate transactions which are so commingled with or related to interstate commerce that all must be regulated if interstate commerce is to be effectively controlled."

Now it must be remembered that in the *Darby* case, the employees worked all of their time on products all of which could be and possibly were transported in interstate commerce. Quoting again from the *Darby* case:

"* * * that the production for commerce, intended, includes at least production of goods, which at the time of production, the employer, according to the normal course of his business, intends or expects to move in interstate commerce although, through the exigencies of the business, all of the goods may not thereafter actually enter interstate commerce."

In the case at Bar, there is no confusion of goods because the Court definitely finds that the only goods with which

we are concerned are the hides, hooves and bones. Neither is the question here one where the Government is seeking to enjoin certain operations or shipments but this is a case of employees seeking to recover time and one-half for overtime and they are faced with the burden of proving the amount of time which they worked on the prohibited article. It appears in so far as we are able to determine that in the case of *Walling* vs. *People's Packing Company*, decided December 16, 1942, Tenth Circuit Court of Appeals, 6 Labor Cases, 61,373, that the employees referred to consumed all of their time in working on the alleged prohibited articles and that case is not authority on this proposition. The Court there found at least that the employees consumed a "substantial" amount of their time on the prohibited articles. We quote from the opinion:

> "While the primary object of the work of employees in the slaughtering departments is to produce edible meat and meat products, the major portion of their manual efforts is exerted in the removal of hides and the inedible portions from carcasses, thereby producing valuable by-products."

We therefore assert that the Supreme Court of Kansas committed error in subjecting the petitioner to the provisions of the Fair Labor Standards Act when the respondents consumed only an infinitesimal and unsubstantial portion of their time and manual efforts on products that have even a remote relation to interstate commerce.

PROPOSITION THREE.

Is the petitioner entitled to a fourteen-week exemption from the operation of the Act under Section 7 (c) of the Act?

We have here the anomalous situation of the Court, holding that the respondents work their whole time in the prep-

aration of goods for interstate commerce and assessing judgment against the petitioner accordingly, and on the other hand denying to the petitioner the fourteen week exemption, justifying the holding on the ground that the respondents do not work their whole work week in the preparation of goods for commerce. (R. 238-240) The Courts which have had occasion to consider this question are as follows:

Fleming Adm. v. *Swift & Company,* U. S. Dist. Court, Northern Dist. of Ill., Nov. 3, 1941. Igoe, Dist. Judge. 4 Labor Cases 60,685. Not reported in Official Adv. Sheets.

"An employer may take the benefit of the exemption law during any work week, whether or not they are consecutive, in the calendar year not exceeding fourteen work weeks in the aggregate for employees in the place of employment where the employer is engaged in exempt operations. This is exemption which comes under section 7(c) of the Act and includes, among others, those engaged in hog dressing, beef dressing, cleaning of hog casings, warming pork and beef, warming fancy meats, washing beef and pork, dressing and sanisealing, and handling, slaughtering, and dressing as it is used in trade usage."

Walling v. *Swift & Co.,* U. S. Circuit Court of Appeals, Seventh Circuit. October 27, 1942, 6 Labor Cases 61,261.

"The fourteen week exemption granted by Section 7(c) of the Act for handling, slaughtering or dressing livestock need not be taken by the employer during the same work week for all the employees in the place of employment who are within the scope of the exemption, but may be taken as to each individual employee for fourteen weeks. To hold otherwise would be to disregard the purpose of the exemption which is to enable the employer to avoid the burden of time and

> one-half for overtime in those seasonal peak periods when he must work to take care of the product on the market."

If the decision of the Supreme Court of Kansas is to be reconcilable with itself, we believe the fourteen week exemption should be allowed.

PROPOSITION FOUR.

What amount should be allowed to respondents as attorney fees?

Section 16 (b) of the Act, (29 U. S. C. A. 16 (b)) provides that:

> "The Court in such action shall, in addition to any judgment awarded to the plaintiff, or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and the costs of the action."

We appreciate, of course, that the amount of attorney fees to be allowed must be governed by the sound discretion of the Court. The Court allowed judgment for the respondents in the sum of $4,938.36 and added to this an attorney fee of $2,000.00 and added an additional $500.00 if the petitioner should appeal to the Supreme Court of Kansas and added an additional $500.00 if the petitioner should appeal to this Court. Therefore, the attorney fee is now $3,000.00 in addition to the judgment for the respondents in the sum of $4,938.36. The attorneys for the respondents have a written agreement that they are to receive fifty per cent of the amount recovered. (R. 202) If this contract is performed specifically, it would be hard to determine whether the attorneys would get a fee of $3000.00, or fifty per cent of the whole, which would be $3,969.18, or the $3,000.00 and fifty per cent of that recovered for the re-

spondents which would be $5,469.18, leaving the respondents $2,469.18 for their portion. We offered the testimony of some very prominent Kansas attorneys which indicated that the Court abused its discretion in making such an allowance. (R. 175-186) We doubt if it was within the contemplation of Congress that the petitioner should suffer such a burden in attempting to obtain a judicial clarification of the language employed by Congress.

Midcontinent Pipe Line Co., et al. v. *Hargrove.* October. 129 Fed. (2nd) 255. Tenth Circuit Court of Appeals.

Huxman, Circuit Judge, Dissenting—"The penalties provided by the Act are severe—so severe that in many instances employers hesitate to assert rights in Court which they honestly feel they have, because of the penalties they suffer if they are mistaken and the judgment goes against them. This should be kept in mind in the administration of the Act. Excessive and burdensome attorney fees should not be added to the mandatory penalties of the Act where a claim is resisted honestly and in good faith by an employer."

Robinson v. *La Rue,* 156 S. W. (2nd) 432. Sup. Ct. of Tenn. November 29, 1941.

"Defendant in error never made any claim that he was subject to the Act or that he was entitled to more compensation than he was receiving until after his services were dispensed with. The penalty imposed by this Act is harsh and severe, and where, as in this case, a doubt exists by the employer as to whether it applies to a particular employee, we are not disposed to place a greater burden upon the employer than is necessary in order to comply with its mandates."

We assert, therefore, that the Supreme Court of Kansas committed error on this proposition.

Summary.

The Supreme Court of Kansas committed error in the following respects:

I. In holding that the work performed by the respondents constituted the preparation of goods for interstate commerce.

II. In holding that the petitioner was subject to the Act during the whole period of the respondents employment when they only worked an infinitesimal portion of the time on the preparation of goods that had even a remote connection with interstate commerce.

III. In holding that the petitioner was not entitled to a fourteen week exemption from the Act under Section 7 (c) thereof.

IV. In abuse of discretion in allowing attorney fee which is not compatible with the reason and spirit of the Act.

Wherefore, the petitioner prays this Court to grant a writ of certiorari and review the decision of the Court below.

Respectfully submitted,

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